S.B. CIVIL Execution First Appeal No.5/2004

Smt. Kanta Bhandari & Ors. Vs. Allahabadd Bank & Anr.

DATE OF JUDGMENT :: 01-11-2004

HON'BLE MR. PRAKASH TATIA,J.

Mr. Shambhoo Singh, for the appellants.

Heard learned counsel for the appellants and perused the record.

The appellants are aggrieved against the order dated 6.5.2004 by which appellants' objection petition under Order 21 Rule 58 CPC was dismissed by the executing Court.

Brief facts of the case are that the respondent No.1 obtained money decree against the respondent No.2 in execution of the decree. One house of respondent No.2 was attached by the respondent No.1 bank. The appellants who are the real brothers and sister, submitted an objection petition under Order 21 Rule 58 CPC alleging therein that the property in dispute was initially belonging to appellants and respondent No.1's father late Manohar Singh expired in the month of August, 1992. After the death of said Manohar Singh, all the co-sharers remained in possession of the property. Co-sharers, appellants and Ashok Bhandari and Gulab Singh Bhandari alongwith respondent No.2 orally partitioned the property and took possession of the property which fell in their share. In partition, the judgment-

debtor respondent No.2 was not given any share in the house which is ought to be auctioned in execution and respondent No.2 was given another house which was sold by respondent No.2 by registered deed dated 7.5.2001 to one Smt. Chandralekha. According to objectors, the respondent No.2 has no share in the house and the property is ancestral property, therefore, it cannot be auctioned.

The trial Court permitted appellants to produce evidence. The appellants produced witnesses AW-1 Ashok Bhandari and AW-2 Dulhe Singh and produced family settlement Ex.1. The decree-holder produced witness DW-1 Kishanlal. The respondent no.2 did not appear to give his statement. The trial Court after considering the alleged family settlement Ex.1 and the evidence of the witnesses held that the appellants did not produce even the attesting witnesses who attested the Ex.1 and respondent No.2 even could not have courage to give evidence about the family settlement. The trial Court further observed that to avoid the payment of the decretal amount, judgment debtors, brothers and sister have raised absolutely frivolous objection.

Learned counsel for the appellant submits that it is not necessary that partition should be effected by registered partition-deed only. A family arrangement is enough to effectuate the partition between coparceners and to confer right of separate share and enjoyment thereof. For this, learned counsel for the appellants relied upon the judgment of the Hon’ble Supreme Court delivered in the case of Digambar Adhar Patil Vs. Devram Girdhar Patil(Died) and Anr. reported in AIR 1995 SC 1728.

Learned counsel for the appellant has also relied upon the judgment of this Court delivered in the case of Sohanlal Vs. Nathmal reported in 1989(1) RLW 155, wherein it has been held that decree-holder can only proceed against the judgment debtor in respect of the half share of the ancestral land.

I considered the submissions of learned counsel for the appellants and perused the record also.

It is clear from the facts of the case as alleged by the objectors-appellants themselves that the said Manohar Singh is ancestor of the appellants. In his statement, AW-1 Ashok Bhandari stated that in the lifetime of his father, the property was partitioned orally. This comes to the period before 1992. Despite this fact, it is alleged that the deed was executed between the parties evidencing the past transaction of the partition in the year 2001. The appellants did not produce even the attesting witnesses and the judgment-debtor himself did not give his statement before the executing Court about the alleged partition. The statements of AW-1 and AW-2 were considered by the trial Court and also by this Court. The statements of both the witnesses lack credibility which are contradictory as well as gives out improbable facts.

In view of the above facts, when plaintiffs failed to prove that what they have alleged in their objection petition, the executing Court had no option but to dismiss the objection petition. There is no explanation why the attesting witnesses

were not produced. The contention of learned counsel for the appellants that the property was partitioned in the year 1992 or before that, then they failed to prove the partition and , there is no finding of the Court below that property is ancestral property giving any share to the appellants after the death of Manohar Singh.

In view of the above, the judgments relied upon by learned counsel for the appellants are not applicable to the facts of this case.

Hence, the appeal of the appellants is dismissed.

[PRAKASH TATIA],J.

Praveen